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## The Expert Witness: Selection and Compensation

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## THE EXPERT WITNESS: SELECTION AND COMPENSATION

AN understanding of the difficulties which have arisen in connection with the obtaining of expert testimony and which have occasioned recent widespread criticism<sup>1</sup> requires a brief review of the development of procedures relating to expert testimony and of its place and purpose in our system of litigation. Contrary to the belief of many, the admissibility of expert testimony is not an exception to the opinion rule inasmuch as expert testimony was used by the courts many years before the present exclusionary rules of evidence, including the opinion rule, developed.<sup>2</sup> The earliest expert witnesses were called "to accommodate comparatively rare cases involving the crude science of an earlier day."<sup>3</sup> Thereafter, as the modern adversary theory of litigation developed and the distinction between witness and jury became apparent, reliance upon the expert witness continued and rules governing such testimony developed along with the opinion rule and not as an exception to it. Thus the generally accepted basis for the latter rule is that the opinion of a lay witness is excluded as merely "superrogatory evidence," while

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<sup>1</sup> 10 N. Y. STATE BAR ASSO. REP. (1887) 18; Hand, *Historical and Practical Considerations Regarding Expert Testimony* (1901) 15 HARV. L. REV. 40; WHARTON AND STILLE, *MEDICAL JURISPRUDENCE* (5th ed. 1905) § 1266; Friedman, *Expert Testimony, Its Abuse and Reformation* (1910) 19 YALE L. J. 247; *Report of Committee of Board of Circuit Judges of Wisconsin* (1919) 10 J. CRIM. L. & CRIMIN. 188; White, *Expert Testimony in Criminal Procedure Involving the Question of the Mental State of the Defendant* (1923) 11 J. CRIM. L. 499; Shelton, *Greater Efficacy of the Trial of Civil Cases* (1928) 32 LAW NOTES 45; Moss, *The Practicing Physician in Court* (1929) 15 A. B. A. J. 497; *Report of the Second Judicial Conference of Pa.* (1929) 297 Pa. St. xxix; Anderson, *Expert Testimony, Its Evils* (1929-30) FLA. STATE BAR ASSO. L. J. 18; Yankwich, *On the Use of Experts* (1930) 26 A. B. A. J. 736; White, *Judicial versus Administrative Process at the Prosecution Stage* (1935) 25 J. CRIM. L. & CRIMIN. 851; 2 WIGMORE, EVIDENCE (3d ed. 1940) § 563.

<sup>2</sup> Hand, *loc. cit. supra* note 1.

<sup>3</sup> Harno, *Uniform Expert Testimony Act* (1938) 21 J. AM. JUD. SOC. 156.

expert testimony is admissible because there have arisen matters as to which the ordinary knowledge and experience of the trier of fact is insufficient to enable it to draw all necessary inferences.<sup>4</sup> Since it is essential that such facts be supplied, the expert witness is called in to aid the court and the trier of fact by supplementing "the premises upon which the reasoning of the trier of fact is based with those premises obtained from his experiential qualifications, thereby endowing the trier of fact with sufficient knowledge to understand the significance of the evidence and to make the inferences."<sup>5</sup>

If the expert is to aid the court and jury by serving as an adviser on matters of a theoretically absolute nature but with which the jury is not acquainted, he should be completely unbiased and disinterested. But under the present system of providing expert witnesses, it is difficult, if not altogether impossible, for the expert to fulfill this purpose since he is selected by a party, compensated by a party, and too often coached by a party. These incidents are hardly conducive to the desired impartiality—especially when considered in the light of our adversary system—since the very nature of the evidence sought to be adduced is such that partisanship, whether intentional or unintentional, can rather easily be disguised despite the supposed protection of cross-examination.<sup>6</sup> The almost inevitable result—testimony of a somewhat biased character—has been condemned often and in unmeasured terms.<sup>7</sup>

Various recommendations which have been offered to over-

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<sup>4</sup> 7 WIGMORE, EVIDENCE (3rd ed. 1940) § 1918.

<sup>5</sup> Rosenthal, *The Development of the Use of Expert Testimony* (1935) 2 LAW & CONTEMP. PROB. 403. It is to be noted that the "expert may testify to facts he has been able to observe because of his special skill and from these facts the jury may then draw the conclusions, or testify as to an opinion of facts for which the jury has not sufficient experience to arrive at an intelligent opinion." *Id.* at 404, n. 5. It is the latter testimony that is more often subject to criticism, since the former is not actually opinion but is of a more exact nature and not subject to controversy.

<sup>6</sup> See MACMILLAN, LAW AND OTHER THINGS (1937) 250, quoted in 2 WIGMORE, EVIDENCE (3rd ed. 1940) § 56L.

<sup>7</sup> See note 1 *supra*; Legis. (1938) 38 COL. L. REV. 369.

come these recognized difficulties seem to have certain common objectives, which may be thus summarized: (1) To provide competent, reliable, and unbiased expert testimony which can justifiably be given weight by the jury;<sup>8</sup> (2) to assure proper presentation of all relevant facts upon which the experts may have based their opinion, thus reducing as far as possible the clashes between opposing experts which at present confuse rather than aid the jury; and (3) to provide expert testimony with the least expenditure of time and money, while at the same time maintaining the inherent rights of both parties preserved by the adversary form of litigation and constitutional guarantees. Admittedly such objectives may not be obtained by correction of any single feature of present practice, and the problems presented cannot be divorced from other problems encountered in fields beyond the law of evidence<sup>9</sup> which make any simple solution unlikely.<sup>10</sup> However, of the many suggestions that have been urged, probably the most practicable and feasible have dealt with the methods of selection and compensation of experts<sup>11</sup>—admittedly two principal grounds for recent criticism—and these deserve further consideration.

### SELECTION

For purposes of discussion of the modes of selection of the witness, expert testimony has been classified on the basis of its source as, first, that which the court obtains, either by appointment of its own expert or through some other impartial agency, and second, that which a litigant obtains. This analysis recognizes the two somewhat conflicting principles which operate in

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<sup>8</sup> Legis. (1934) 9 Wisc. L. REV. 289; 2 WIGMORE, EVIDENCE (3rd ed. 1940) § 563.

<sup>9</sup> Legis. (1938) 38 COL. L. REV. 369; *Report of Medico-Legal Problems Committee of the Section of Criminal Law for the Am. Bar Asso.* (1935) 26 J. CRIM. L. & CRIMIN. 292.

<sup>10</sup> Eliasberg, *Opposing Expert Testimony* (1945) 36 J. CRIM. LAW & CRIMIN. 231.

<sup>11</sup> See, e.g., Yankwich, *On the Use of Experts* (1930) 26 A.B.A.J. 736; Bomar, *The Compensation of Expert Witnesses* (1935) 2 LAW & CONTEMP. PROB. 510; Legis. (1938) 38 COL. L. REV. 369; McCormick, *Some Observations upon the Opinion Rule and Expert Testimony* (1945) 23 TEX. L. REV. 109; WIGMORE, *op. cit. supra* note 6; Shelton, *loc. cit. supra* note 1.

this connection, that the expert is to aid the trier of fact as an impartial observer, and that every party to a suit has a right to adduce all the evidence in his favor, including that of expert witnesses. Before consideration can be given to the method of selection of the expert, it must be determined whether the right of a party to select expert witnesses of his own choice should be preserved. This raises the further question whether, under constitutional provisions, such a right can be denied. Some writers assert that the right of a party to obtain all available evidence for the prosecution of its cause does not include the right to select experts, since the experts supply evidence of a very special nature.<sup>12</sup> These argue that since the court may summon additional experts to review testimony already presented<sup>13</sup> and may limit the number of witnesses called by either side<sup>14</sup> and since the legislature may forbid altogether the reception of opinion or expert testimony for the establishment of any fact in issue upon trial, the legislature may confirm, and at the same time regulate, the exercise by the court of this discretion by prohibiting the use of experts chosen by either side. These urge that all experts should be selected by an unbiased, disinterested person,<sup>15</sup> since only by this method may complete independence—and hence impartiality—be obtained.

Assuming that a party could be denied the right to call experts of its own choosing—a matter as to which there is no little doubt<sup>16</sup>—it would seem that certain advantages are to be gained by perpetuation of the present practice that outweigh any disadvantages, at least if impartial court-appointed experts are also employed to

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<sup>12</sup> Endlich, *Proposed Changes in the Law of Expert Testimony* (1898) 32 AM. L. REV. 851.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*; *Frazer v. Jenison*, 42 Mich. 206, 3 N.W. 882 (1879); *People v. Kemp*, 76 Mich. 410, 43 N.W. 439 (1889).

<sup>15</sup> Elliott and Spillman, *Medical Testimony in Personal Injury Cases* (1935) 2 LAW & CONTEMP. PROB. 467; Hand, *loc. cit. supra* note 1; Shelton, *loc. cit. supra* note 1.

<sup>16</sup> See 2 WICMORE, EVIDENCE (3rd ed. 1940) § 563.

serve as a check upon party experts. The advantages of such a combined system of obtaining experts are several: First, it would preserve the traditional, if not the constitutional, privilege of a party to adduce all evidence in its favor while at the same time minimizing the evils of party selection; second, party witnesses would serve as a check upon the court witnesses and thus insure against suppression of the truth<sup>17</sup> by exposing any errors resulting from incompetence or from a "prosecution complex" that might develop if a particular court expert should be used frequently or should be closely associated with the court; third, such procedure would reduce the number of party witnesses,<sup>18</sup> with a saving of time and expense, since the party witness would be placed in a somewhat inferior position by reason of the very fact of party selection and the bias that would be imputed therefrom; and fourth, the competitive element would be preserved but at the same time would be regulated by the relative standing of the party expert in the eyes of the trier of fact, so that in case of a conflict the trier would probably turn to the court's witness for guidance.<sup>19</sup> For these reasons it would seem that the party-designated expert, assuming proper regulation of his selection and compensation and the addition of a court-appointed expert, could effectively serve the ends of justice.

### *Selection of Court-appointed Experts*

It is often suggested that court-adduced expert testimony should be obtained solely through permanently appointed state experts or a board of experts somewhat similar to those found in continental countries.<sup>20</sup> Under such an arrangement, the permanent state experts could make investigations as well as present evidence, the role of the party expert being limited to disputing or

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<sup>17</sup> *Ibid.*

<sup>18</sup> McCormick, *loc. cit. supra* note 11.

<sup>19</sup> Note 16 *supra*.

<sup>20</sup> Eliasberg, *Opposing Expert Testimony* (1945) 36 J. CRIM. L. & CRIMIN. 231; Legis. (1938) 38 COL. L. REV. 369.

disproving the reports and findings of the state experts; or the permanent state expert might be used merely as another expert witness. Certainly the state expert under this arrangement would be free from any partiality toward a party; but in criminal cases, the very partiality sought to be destroyed might be merely shifted to the side of the state inasmuch as the expert as a member of the permanent legal staff might easily develop a "prosecution complex."<sup>21</sup> This system has been vigorously opposed both in this country<sup>22</sup> and abroad<sup>23</sup> on the ground that the arrangement is subject to political manipulations<sup>24</sup> and may frustrate the use of the latest scientific developments<sup>25</sup> because of the permanence of the expert's appointment. Moreover, in view of the tendency toward specialization and the growing complexity of scientific endeavor, so great a number of experts would be required that, even if sufficient experts could be maintained, the system would seem undesirable because of the considerable expense to the state which could be avoided by other procedures almost as satisfactory.

It has also been suggested, as an alternative proposal, that there could be an assessor<sup>26</sup> who would sit with the trial judge as an advisor. Joint management by the judge and the assessor of the presentation of expert testimony would result, the assessor directing and controlling the examination of expert witnesses and summing up all expert testimony prior to the judge's charge and subject to cross-examination by counsel. If the assessor were permanent, similar criticisms might be offered here as in the case of the staff of permanent state experts. The use of experts as referees<sup>27</sup> has been suggested as a simple but satisfactory method

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<sup>21</sup> Eliasberg, *loc. cit. supra* note 20.

<sup>22</sup> Plasowe, *The Expert in France, Germany, and Italy* (1935) 2 LAW & CONTEMP. PROB. 504.

<sup>23</sup> LAILLER ET VONOVEN, *LES ERREURS JUDICIAIRES ET LEURS CAUSES* (1897) 97 et seq.

<sup>24</sup> 2 WIGMORE, *op cit. supra* note 8.

<sup>25</sup> Eliasberg, *loc. cit. supra* note 20.

<sup>26</sup> Benschel, *The Use of Experts by the Court* (1941) 54 HARV. L. REV. 1105.

<sup>27</sup> *Ibid.*

already permitted by the common law and in special cases in the federal courts, whereby the issues can be simplified before presentation to the trier of fact. Nevertheless, most courts refuse to use such power unless expressly authorized by statute. At best, it would seem that such a system would be of limited utility; although it could and should be used in many instances, it would probably not reach the more important cases requiring expert testimony presented directly to the trier of fact.

Another suggestion, and one which has received the approval of a number of writers,<sup>28</sup> lawyers,<sup>29</sup> legislatures,<sup>30</sup> and Congress,<sup>31</sup> would require the court to appoint experts in any case in which the judge considers it necessary. Such experts would be from outside the judicial organization; hence a wide range of experts informed as to recent scientific progress would seem assured. There has been little criticism or skepticism of this procedure insofar as it permits the court to decide when an expert should be called in to aid in the giving of testimony. Questions have, however, been raised as to the advisability of the court's making the appointments.<sup>32</sup> The principal grounds of objection at this point

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<sup>28</sup> Shelton, *Greater Efficacy of the Trial of Civil Cases* (1928) 32 LAW NOTES 45; Elliott and Spillman, *Medical Testimony in Personal Injury Cases* (1935) 2 LAW & CONTEMP. PROB. 467; McCormick, *Some Observations Upon the Opinion Rule and Expert Testimony* (1945) 23 TEX. L. REV. 109.

<sup>29</sup> *Report of Committee on Jurisprudence and Law Reform of the Am. Bar Asso.* (1926) 51 A.B.A. REP. 435; (1887) 10 N. Y. STATE BAR ASSO. REP. 18; AMERICAN LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE (1930) §§ 307 and 308 provide for the appointment of experts by the court "whenever the issue of insanity or mental defect on the part of the defendant . . . become an issue in the cause . . ." See also AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE (1942) Rule 403.

<sup>30</sup> CAL. PEN. CODE (Deering, 1931) § 1027; CAL. CODE CIV. PROC. (Deering, 1931) § 1871; Colo. Laws 1927, c. 102; IND. ANN. STAT. (Baldwin, 1934) § 2216; WISC. STAT. (1933) §357.12. A complete list is to be found in Bomar, *The Compensation of Expert Witnesses* (1935) 2 LAW & CONTEMP. PROB. 510.

<sup>31</sup> FED. RULES CRIM. PROC. (1946) Rule 28.

<sup>32</sup> Overholser, *The History and Operation of the Briggs Law of Massachusetts* (1935) 2 LAW & CONTEMP. PROB. 437; Legis. (1934) 9 WISC. L. REV. 239. Mr. Stanley H. Fuld commented on Rule 28 as follows: "I am reminded of an article that Judge Willard Bartlett wrote . . .: 'I believe that justice in the United States is generally well and honestly administered; but such a thing is conceivable as that a judge might unwittingly appoint incompetent official experts who were anything but representative of the best elements of the medical profession. . . A man may be a good judge of law and yet be a poor judge of doctors.'" FEDERAL RULES OF CRIMINAL PROCEDURE WITH NOTES AND PROCEEDINGS OF THE INSTITUTE CONDUCTED BY THE NEW YORK UNIVERSITY SCHOOL OF LAW (1946) 201.

have been, first, that such appointments would be subject to political manipulations, and second, that the court is no more competent than are the parties to select experts.<sup>33</sup>

Inasmuch as the latter proposal is probably somewhat more deserving of consideration than either the continental procedure or the proposal for an assessor or referee, the merit of these objections may well be examined. As to any danger of political factors entering in, this risk is ever present where the court exercises discretion, can always be overemphasized, and if deemed persuasive, would prevent the court's ever being given any discretionary power. The fact that many courts are hesitant to act in this connection without statutory sanction<sup>34</sup> and that the courts have not used such power in the past is no serious argument against its being used. Nor does the previous failure of courts to employ this procedure<sup>35</sup> require the adoption of a more radical departure if the appointment of outside experts by judges, when deemed necessary, appears sufficient to insure the desired result. On the other hand, the suggestion that the judge may not be competent to select experts seems a more serious objection since the court expert will be the principal expert and will have recognition as such from the trier of fact. In answer to this criticism, it has been suggested that the court's power of selection be guided, *e.g.*, by a list or panel of experts<sup>36</sup> prepared by professional or scientific associations<sup>37</sup> from which the judge should choose the witnesses. However, the preparation of such a list would be so difficult at the outset because of the multiplicity of fields in which experts are from time to time required that it would be practically impossible to make a complete list. Moreover, such a system might be open to the

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<sup>33</sup> Endlich, *Proposed Changes in the Law of Expert Testimony* (1898) 32 AM. L. REV. 851.

<sup>34</sup> Beuscher, *The Use of Experts by the Courts* (1941) 54 HARV. L. REV. 1105, 1111.

<sup>35</sup> Weihofen, *An Alternative to the Battle of Experts: Hospital Examination* (1935) 2 LAW. & CONTEMP. PROB. 419.

<sup>36</sup> Bomar, *The Compensation of Expert Witnesses* (1935) 2 LAW & CONTEMP. PROB. 510; Eliasberg, *loc. cit. supra* note 20.

<sup>37</sup> See note 33 *supra*.

criticism so often provoked by the "performance of a public function by a non-official body which has no direct responsibility in the administration of justice."<sup>38</sup> And in any case, such a procedure would still require the judge to decide in a particular case which type of expert is needed. Hence it seems that little would be gained by the preparation of such a list, since the court assuredly has long been recognized as qualified to pass upon the character and reputation of the witnesses.

A board of experts possibly could aid the court in deciding what type of expert would be best qualified in a particular case. However, again the multiplicity of experts would make such a procedure somewhat infeasible. It would seemingly be impossible to constitute a single examining board which "would possess all or even a considerable proportion of the qualifications for the examination of candidates in all the various branches of knowledge concerning which experts are called to testify, and equally impracticable to establish and maintain the requisite large number of independent examining boards."<sup>39</sup> It would seem that in many cases the judge would be equally competent to select such experts and should, therefore, be left with discretion in each case. However, it might be advisable to have the counsel for the parties nominate or recommend experts for the judge's consideration, since these representatives of the parties have made a thorough investigation of the particular case and would be well advised as to the type of witness best qualified; moreover, counsel would probably be hesitant to suggest an expert of bad character or reputation. Thereupon the judge could choose those best qualified as to reputation and character and scientific knowledge and might select another expert of his own choice but within the field indicated.

In any case it would seem advisable that more narrow defini-

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<sup>38</sup> Taft, *Opinion Evidence of Medical Witnesses* (1927) 14 VA. L. REV. 81.

<sup>39</sup> Foster, *Expert Testimony—Prevalent Complaints and Proposed Remedies* (1897) 11 HARV. L. REV. 169, 184.

tions of expert capacity be formulated and that statutory qualifications be provided for certain types of experts.<sup>40</sup> This procedure has been adopted in several states,<sup>41</sup> and although its application to the entire field of expert testimony is not feasible, it seems desirable as to the more important and frequently used classes of experts. Such prescribed qualifications could serve the dual purpose of guiding both the parties and the judge in the selection of experts.

### *Selection of Party-appointed Experts*

Of the procedures available for the regulation of the selection of party experts, it would seem that one of the most promising methods would be to require that all selections be made from a list prepared by professional or scientific groups and approved by the court. However, as has been pointed out previously, this procedure involves difficult problems of administration. On the other hand, a somewhat more practical procedure would be to require the approval by the trial judge of each appointment of an expert witness<sup>42</sup> before presentation of their testimony; by this method, it should be possible to eliminate experts undesirable because of unsatisfactory reputations. Or, to go a step further, it would seem quite desirable, so long as a party designates expert witnesses, that they should then be appointed by the judge and compensated through the court, as will be discussed elsewhere. By this method, the parties would be comparatively free to adduce all witnesses in their favor; at the same time, the appointment by the court and compensation by or through the state should insure the witness' independence and freedom from bias. Of course, if this proposal is deemed too far reaching or if its adop-

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<sup>40</sup> See note 33 *supra*.

<sup>41</sup> CAL. PEN. CODE (Deering, 1931) § 1027 (Court must appoint two or three alienists, at least one of whom must be from the staff of State institution); LA. CODE CRIM. LAW & PROC. (Dart, 1943) § 267; N. Y. CODE CRIM. PROC. (1939) § 659.

<sup>42</sup> Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence* (1943) 10 U. OF CHI. L. REV. 285.

tion in its entirety would unduly burden the trial judge, its features might be resorted to only in part and as practicable in order to aid in "freeing" the party expert to give unbiased testimony. However, since the party witness will be placed in a somewhat inferior position if court-appointed experts also participate, the method of selection of the party witness would become a somewhat less urgent problem than at present when court-appointed witnesses are not generally available. And, in any event, cross-examination will remain a more or less effective safeguard to reveal the qualifications and predispositions of the party witness.<sup>43</sup>

### COMPENSATION

The problem of compensation of the expert witness is closely related to that of the proper method of selection, the objective being in either case to assure the independence of the expert and resulting impartiality.

It might be suggested first of all that the compensation of the expert witness be limited to the amount of remuneration of the ordinary witness.<sup>44</sup> Although such is the prevailing rule in the absence of statute as to the expert's fees for testimony on the stand,<sup>45</sup> this method of payment would not take into account those fees which must necessarily be paid for special services rendered by the expert outside of the court, for which all courts agree that additional compensation is proper.<sup>46</sup> And if there were a policy against compensation for such preliminary work, the whole system of adducing expert testimony probably would be impaired since the expert would perhaps refuse to make the preliminary

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<sup>43</sup> 2 WIGMORE, EVIDENCE (3rd ed. 1940) § 561.

<sup>44</sup> See Bartlett, *Medical Expert Evidence: The Obstacles to Radical Change in the Present System* (1909) 34 AM. L. REV. 1, 7.

<sup>45</sup> 8 WIGMORE, EVIDENCE (3rd ed. 1940) § 2203; ROGERS, EXPERT TESTIMONY (2nd ed. 1891) § 188.

<sup>46</sup> *Ex Parte Dement*, 53 Ala. 389 (1875); *Wright v. People*, 112 Ill. 540 (1884); *Dixon v. People*, 168 Ill. 179, 48 N.E. 109 (1897); *State v. Darby*, 7 Ohio Dec. 725 (1886); *Summers v. State*, 5 Tex. App. 365 (1879); ROGERS, *op cit. supra.* note 45, § 183.

study or examination which in most cases is an indispensable requisite. Such additional compensation, therefore, seems necessary, and England<sup>47</sup> and most states<sup>48</sup> have seen fit to authorize additional compensation of the expert in this connection. However, statutes enacted for this purpose have generally been designed merely to protect the expert and assure him of adequate compensation rather than to protect the system as a whole from abuse.

It has also been urged by many writers that the expert should be compensated entirely by the state.<sup>49</sup> Although such a system has been championed as the one wholly reliable method of obtaining complete freedom of the expert and of assuring at the same time all the advantages of expert testimony, yet if the estimate that sixty per cent of all cases require expert testimony is at all accurate,<sup>50</sup> the method proposed would increase the public expense of operation of the judicial system substantially, notwithstanding that in any such system there would necessarily be imposed some limitation on the number of witnesses which each side could produce. For this reason, Wigmore<sup>51</sup> and others<sup>52</sup> have suggested that only in the case of court-appointed witnesses should compensation be paid by the state, each party being allowed to compensate its own witnesses. This obviously would reduce the drain on state funds for this purpose; moreover, any party would be assured, in view of the presumably qualified court experts who would also

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<sup>47</sup> Webb, Page 1 Carr. and K. 23 (1843).

<sup>48</sup> A complete survey of the statutes in force in the various American jurisdictions has been made in Bomar, *The Compensation of Expert Witnesses* (1935) 2 LAW & CONTEMP. PROB. 510, 518, n. 57.

<sup>49</sup> Friedman, *Expert Testimony, Its Abuse and Reformation* (1910) 19 YALE L. J. 247; *Report of Committee on Jurisprudence and Law Reform of the Am. Bar Asso.* (1926) 51 A.B.A. REP. 428; Shelton, *Greater Efficacy of the Trial of Civil Cases* (1928) 32 LAW NOTES 45; Note (1910) 1 J. CRIM. L. & CRIMIN. 125; Elliott and Spillman, *Medical Testimony in Personal Injury Cases* (1935) 2 LAW & CONTEMP. PROB. 467.

<sup>50</sup> WELLMAN, *ART OF CROSS EXAMINATION* (1929) 60; Harno, *Uniform Expert Testimony Act* (1938) 21 J. AM. JUD. SOC. 156; Schofield, *Medical Expert Testimony; Methods of Improving the Practice* (1910) 1 J. CRIM. L. & CRIMIN. 41.

<sup>51</sup> 2 WIGMORE, *EVIDENCE* (3d ed. 1940) § 563.

<sup>52</sup> AMERICAN LAW INSTITUTE, *CODE OF CRIMINAL PROCEDURE* (1930) § 309; McCormick, *Some Observations upon the Opinion Rule and Expert Testimony* (1945) 23 TEX. L. REV. 109.

offer testimony, of competent expert testimony, regardless of the financial means of any party litigant. Such procedure has been provided for in several states<sup>53</sup> and recently in the new Federal Rules of Criminal Procedure.<sup>54</sup> There remains the further question as to the proper manner of compensating the party witness. This might be accomplished by taxing compensation as costs,<sup>55</sup> a result which would require statutory authorization since it is generally held that, in the absence of statute, "compensation of experts beyond the regular witness fee is not a necessary disbursement and cannot be taxed as costs."<sup>56</sup> However, such a procedure, if adopted with reference to party witnesses, would not alone remedy the deficiencies of the present system. Such a system would assuredly require the court to limit the number of witnesses and to set or approve the fees paid, both of which results are probably desirable; but such costs, as "a pecuniary allowance, made to the successful party"<sup>57</sup> are based on expenses already incurred; and only after the conclusion of the trial—after both parties have paid experts of their own choosing a compensation privately agreed upon—would costs be determined. Hence, even if the court is given more control over compensation, since in many cases it is not actual bribery or dishonesty that results in bias but merely the witness' desire to give "his client his money's worth,"<sup>58</sup> the expert's independence from indirect party control would not be completely achieved.

On the other hand, the taxing of the compensation of the court-

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<sup>53</sup> *E.g.*, in California, See CAL. CODE CIV. PROC. (Deering, 1931) § 1871 (in Criminal cases, expenses of court appointed witness charged to county, in civil cases, struck off as costs). See also R. I. GEN. LAWS (1938) c. 537, § 20 (in criminal cases at discretion of court); LA. CODE OF CRIM. LAW & PROC. (Dart, 1943) § 267; WIS. STAT. (1933) § 357.12.

<sup>54</sup> FED. RULES CRIM. PROC. (1946) Rule 28.

<sup>55</sup> Lobingier, *Compensation of Expert Witnesses* (1925) 59 AM. L. REV. 266; Bomar, *loc. cit.* *supra* note 48.

<sup>56</sup> Bomar, *supra* note 48, at 517; *The William Branfoot v. Hamilton*, 52 Fed. 390 (C. C. A. 4th, 1892); *Vaulkner v. Hendy*, 79 Cal. 265, 21 Pac. 754 (1889); *Board of Com'rs of Larimer County v. Lee*, 3 Colo. App. 177, 32 Pac. 841 (1893).

<sup>57</sup> BLACK'S LAW DICTIONARY (3d ed. 1933).

<sup>58</sup> Bomar, *loc. cit.* *supra* note 48.

appointed experts as costs appears to have some merit.<sup>59</sup> Thus would be allocated as costs only the charges of an impartial adviser of the court who would be called only when the judge feels that justice would thereby be served; neither party would be unduly burdened, and the state would not be compelled to bear the costs incident to obtaining expert testimony. A somewhat similar procedure has been proposed by the American Law Institute in its Model Code of Evidence.<sup>60</sup> Nevertheless, it does seem that compensation by the state of court-appointed witnesses would be preferable, since it would assure the expert a fair compensation in all cases; after all, the expert would in a true sense be an agent of the court whose compensation properly should be considered the state's obligation.

As to the compensation of the party's witnesses the suggestion has been made in some quarters<sup>61</sup> that payment should be made by the parties with the amount being set by the court. Undoubtedly such a procedure would be preferable to merely taxing the expert's fees as costs; and the supervision by the court over the fees paid would assure fewer purchases of actually perjured testimony or contingent fee contracts. An interesting variation from this formula might be that of requiring notice to, and approval by, the court of the fee of the expert before admittance of such testi-

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<sup>59</sup> See McCormick, *Some Observations upon the Opinion Rule and Expert Testimony* (1945) 23 TEX. L. REV. 109.

<sup>60</sup> AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE (1942) § 410: "The compensation of each expert witness appointed by the judge shall be fixed at a reasonable amount. In a criminal action it shall be paid by (insert proper public authority) under order of the judge. In a civil action it shall be paid as the judge shall order; he may order that it be paid by the parties in such proportion and at such times as he shall prescribe, or that the proportion of any party be paid by (insert name of the proper authority), and that, after payment by the parties or (public authorities) or both, all or part or none of it be taxed as costs in the section. Any witness appointed by the judge who receives any compensation other than that fixed by the judge and any person who pays or offers or promises to pay such other compensation shall be guilty of contempt of court. The fee of an expert witness called by a party but not appointed by the judge shall be paid by the party calling him but shall not be taxed as costs in the action." See also FED. RULES OF CRIM. PROC. (1946) Rule 28; Model Expert Testimony Act, 9 UNIFORM STATE LAWS (Supp. 1944) 41; AMERICAN LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE (1930) § 309.

<sup>61</sup> See note 48 *supra*.

mony.<sup>62</sup> However, both procedures are subject to the criticism that the party is after all the source of the fee and, as aptly put by one writer, "It is doubtful that the alleged partisanship of expert testimony is due in many cases to witnesses who have sold out to the highest bidder; much of the partisanship, perhaps, is due to an uncommon striving to support the cause of the party who will pay his fee, be it large or small."<sup>63</sup> In order to obtain a method more conducive to independence, there has been devised a procedure whereby it is felt that the complete independence of the expert may be achieved and yet without burdening the state with the expense of such fees. This method would require an amount, set by the court,<sup>64</sup> to be paid into court (or bond in lieu thereof) by the party calling the witness; it would then be paid by the court on the termination of the litigation or upon the conclusion of the necessary use of the expert. This procedure, coupled with the suggested method of appointment by the court upon nomination of the respective parties, would seem to obtain the greatest independence feasible and still maintain the right of either party to adduce his own witnesses. It would assure the expert of compensation regardless of the outcome of the suit, and he would look to the court rather than to a party for compensation. In any event, any rule or statutory provision regulating the payment of a party expert should make it a criminal offense to offer or accept a fee greater than that stipulated by the court and requiring the expert to take an oath to this effect.

Although this note has dealt altogether with mechanical aids and procedures, it is recognized that one of the most effective weapons against abuses in this field is that of moral coercion.<sup>65</sup>

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<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> "As long as the standards of the profession countenance this abuse so long will it continue. Whenever the good lawyers will not, the shysters cannot continue to misuse expert testimony." Friedman, *Expert Testimony, Its Abuse and Reformation* (1910) 19 *YALE L. J.* 247, 255. See also Taft, *Opinion Evidence of Medical Witnesses* (1927) 14 *VA. L. REV.* 81.

If the two methods of reform can be joined in application, the usefulness of the expert in the administration of justice will be greatly extended. While the problems presented by the use of expert testimony are not completely solved by the reduction of the evils engendered by partisan experts, such a step is nevertheless of the greatest importance.

*J. P. Wandel.*